government, at no distant day, by the children of Chinese parents, and in view of the omission to provide for the children of our own people born abroad, our constitution ought to be amended, and that without delay.

THOMAS P. STONEY.

San Francisco, Cal.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

SINGERLY *v.* THAYER.

T. agreed to put in for S. an elevator "warranted satisfactory in every respect." After trying the elevator, S. refused to accept it.

Held, reversing the court below, that provided he acted in good faith, S. was by the terms of the contract the sole judge whether the elevator was satisfactory.

ERROR to the Common Pleas of Philadelphia County.

This was an action on the case to recover the contract price of an elevator. The facts are sufficiently stated in the opinion which was delivered by

MERCUR, C. J.—This contention arises on a contract contained in the following written proposal, to wit:

FIFTEENTH AND MARKET,
PHILADELPHIA, PA., 8–10–1881.

WM. M. SINGERLY, ESQ.:

I propose to put my Patent Hydraulic Hoist in your new building on Chestnut street (including a duplex pump worth $800) according to verbal specifications given by your architect, for $2300, warranted satisfactory in every respect.

Yours,
ELI THAYER.

Plaintiff in error accepted this proposition. The elevator was substantially finished. It proved to be unsatisfactory. He therefore declined to accept it, and gave notice that he desired it to be removed. This Thayer refused to do; thereupon Singerly took it down, and holds it subject to the order of Thayer. The latter brought this suit, claiming the contract price.

The controlling question is, What meaning and effect are to be given to the words "*warranted satisfactory in every respect?*" Satisfactory to whom? Certainly not to the maker only. Was it to be satisfactory to the person for whom it was to be made and

by whom it was to be used? The learned judge thought this was not a necessary requirement, but if it was built in a workmanlike manner and performed its intended purpose in a manner which ought to be satisfactory to the plaintiff in error, that was sufficient. In other words, it may have been wholly unsatisfactory to him, yet if the jury thought he ought to have been satisfied, he was bound to accept it. In effect, that is, it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called on to pass on the rights of the parties.

The proposition was made to him to purchase a kind of elevator not in general use. The fair inference is that he desired to purchase one that would be satisfactory to himself. The manifest import and meaning of the language used is that it should be satisfactory to him. This, then, was the agreement. To him alone was the proposition made. It would not have been any clearer had it read, "warranted satisfactory to you in every respect." He, therefore, was the person to decide and to declare whether it was satisfactory. This was a fact which the contract gave him a right to decide. He was the person negotiating for its purchase. He was the person who was to test it and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith.

McCarren v. *McNulty et al.*, 7 Gray 139, was on an agreement to make a book-case "in a good, strong and workmanlike manner, to the satisfaction of the president of the society," for which it was to be made. It was held not to be sufficient to prove that it was constructed according to the terms of the agreement, without also proving that it was satisfactory to or accepted by the defendant.

When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove he ought to have been satisfied. It was so held in *Gray* v. *Rd.*, 11 Hun 70, where the contract was for the purchase of a steamboat; in *Brown* v. *Foster*, 113 Mass. 136, where the agreement was to make a suit of clothes; in *Zaleski* v. *Clark*, 44 Conn. 218, on a contract for a plaster bust of a deceased husband of the defendant; in *Gibson* v. *Cranage*, 39 Mich. 49, where a portrait was to be satisfactory to the defendant, and in *Hoffman* v. *Gallagher*, 6 Daly 42, where a portrait of defendant was to be satisfactory to his friends. So where a person got a set of teeth from a dentist

under an agreement that they were to be satisfactory, it was held, in *Hartman* v. *Blackburn*, 7 Pittsburgh Legal Journal 140, that he was made the exclusive judge of their value.

To justify a refusal to accept the elevator on the ground that it was not satisfactory, the objection should be made in good faith. It must not be merely capricious. It is declared in 1 Parsons on Contracts 542, if A. agrees to make something for B., to meet the approval of B., or with any similar language, B. may reject it for any objection which is made in good faith, and is not merely capricious. *Andrew* v. *Belfield*, 2 C. B. (N. S.) 779, is cited to support this view. That case arose on a written agreement to build a carriage, in a manner which should meet the approval of the person for whom it was to be made, not only on the score of workmanship, but also that of convenience and taste. It was held that his rejection, made in good faith, was conclusive.

This "hoist" is unlike those in most general use. They are usually suspended from a wire or rope cable, which may be operated either by water or by steam; this is supported by a single upright iron column made in sections, which run into each other, like the sections of a telescope; it stands under the centre of the car; when the sections are folded closely together the car is at its lowest position; on the water being poured into the sections by a steam pump, the pressure of the water within the column causes the sections to draw out, thereby forcing the car upward, and so sustaining it. When a valve is opened, the water escapes, then the weight of the car and the weight of the upper sections of the column cause the sections to run into each other, and the car descends.

While the evidence is conflicting as to the efficient working of the elevator, and the weight thereof induced the jury to find the elevator ought to have been satisfactory, yet we think there is evidence to show the plaintiff in error acted in good faith and not in mere caprice, in refusing to accept it. We will refer to some. John Doris testifies that he ran this elevator about a month; that he would take it from the first to the sixth floor; it would almost drop from the sixth to the third floor, and then it would almost stop, and then go slowly down; it acted the same whether the steam pressure was great or small, it would start and jump in getting up to where we wanted to go; almost every trip it would drop suddenly from the sixth to the third floor; if we put on a load it would jump all the way up. John Norris, who rode on it four or five times,

says, "it was jerky, and every little period it gave a little jerk, causing your stomach to rise." Albert Merritt testified he had ridden on them, but they were so unsatisfactory and uncertain that he preferred to walk upstairs; they would stick both going up and coming down. He had one of the same kind, which he says was not entirely completed, although two or three months were occupied in trying to put it in order; he "considers them the biggest frauds he ever saw in the elevator line." S. Lloyd Wiegand, a mechanical engineer of twenty-eight years experience, testifies that a building of moderate height can use them very well; it don't work well in a tall building." Hale, the architect of the building, rode on it and saw it often. He says, it did not run smoothly; at the end of every section it would give a jerk and a click. He examined this and others of the same kind to report to the plaintiff in error, and "came to the conclusion that it would never do as a passenger elevator on which ladies were to ride." He informed the agent of the contractor that the elevator was a failure. Plaintiff in error also testifies to its jerking and irregular motion, being such as to scare him, and his fear of an accident; of notice to the agent that it was unsatisfactory; and of his offer to give $500 if he would take it out.

It may have been very unwise in the maker of this elevator to agree to expend labor and furnish materials and rely for payment on the uncertain approval of one so largely interested in determining whether it was satisfactory to himself. Having, however, entered into a contract whereby he did run this risk, his legal rights are to be determined thereby; *McCarren* v. *McNulty et al.*, *supra*. In *Nelson* v. *Von Bonnhorst*, 5 Casey 352, one gave a written instrument under seal admitting an indebtedness to another in a specific sum, which he agreed "to pay whenever, in my opinion, my circumstances will enable me to do so." It was held that the instrument imposed no legal obligation which could be enforced by action, as the maker was the sole judge of his ability. In that case there was an unquestioned indebtedness to be discharged by the payment of money. Every other person might swear the circumstances of the debtor made him abundantly able to pay, yet that did not determine his legal liability.

It is claimed that the elevator was rejected before it was finished, and, if time had been given, it would have been made satisfactory. If, in fact, it was rejected before it was substantially completed, so

that the plaintiff in error could not reasonably determine whether it was or would be satisfactory to him in all respects, then his rejection was prematurely made, and, under the pleadings, would not constitute a bar to the action. If, however, it was sufficiently completed so he could understand how it would operate, he was not bound to wait an unreasonable time for the entire completion of some minor things.

In so far as the specifications of error are in conflict with this opinion, they are not sustained.

Judgment reversed and a *venire facias de novo* awarded.

A high authority, Dr. Wharton, (Contracts sect. 289, note) criticises the book-case case, cited in the foregoing opinion, and the case of *Atkins* v. *Barnstable*, to be noticed further on, as going "too far in leaving the matter to the purchaser's caprice." Still we believe that the opinion of MERCUR, C. J., lays down the reasonable, as well as the actual rule. For it must be borne in mind that the law assumes not to make contracts, but to enforce them according to what the parties intended, according to the ordinary meaning of words. If the parties choose to make a hard contract, that is their own lookout.

A word or two more may be said as to some of the authorities cited in the principal case.

In *Gray* v. *Railroad* the steamboat was to be taken, "provided upon trial, they (the purchasers) are satisfied with the soundness of her machinery."

The plaster-bust case is a very strong one. The order was taken by the sculptor's agent, who assured Mrs. Clark that she need not take the bust unless satisfied with it. Mrs. Clark visited the studio more than once while the work was in progress, and made some suggestions which the artist carried out. The lack of proper life-like expression, which was the objection to the bust, appeared to be not the artist's fault, but owing to the nature of the bust as a dead-white model. Here was a case of capricious dissatisfaction if ever one there was; but as the court pithily said, the contract was not to make a bust that she ought to, but one that she would, be satisfied with.

In *Brown* v. *Foster* evidence was given of the custom among tailors, that clothes should be sent back for alteration if they did not fit. The defendant was called upon to try on the clothes in court, and several tailors testified that a few alterations would make them right; but the contract was for a suit to be ready at a certain day, and the court refused to interfere. Leaving now the cases adduced by MERCUR, C. J., in *Atkins* v. *Barnstable*, 97 Mass. 428, one of the cases which Dr. Wharton objects to, the contract was for work to be done "to the acceptance of the county commissioners." In *Barlow* v. *Thompson*, 46 Ind. 384, water-wheels were to work to the "entire satisfaction" of the purchaser.

In *Harris* v. *Miller*, 6 Saw. 319, under an agreement that they should have a bond "to their satisfaction," defendants were held to be justified in refusing plaintiff's own bond, and demanding a bond with sureties; but this case is not as strong as are the others, other circumstances beside the tenor of the contract rendering a bond with sureties proper.

In an English case, *Roberts* v. *Smith*, 4 H. & N. 315, the plaintiff was to be engaged at a certain salary, as secretary of a company about to be formed; in case the company was not formed he was

to receive for his time and labor expended, such remuneration as the defendant might deem right. The company was not formed, and the plaintiff brought suit for his compensation. The court decided that there was no contract such that he could recover upon, and MARTIN, B., said: "The argument that, as a matter of law, the plaintiff is entitled to be paid, is incorrect; it is by no means a matter of law that a person shall be paid for his services—it is a matter of contract." Other members of the court alluded to the probability that the plaintiff was willing to take the chance of losing all compensation, to ensure his position in case the company should be organized. And on this subject a recent English author (Pollock on Contracts, p. 44) remarks: "A promise of this kind, though it creates no enforceable contract, is so far effectual as to prevent the promisee from falling back on any inferred contract to pay a reasonable remuneration."

In *Hartford Co.* v. *Brush*, 43 Vt. 528), the sale was of a patent sugar evaporator, which the defendant was to take if he liked it. It was in evidence that the defendant was sick during most of the time the apparatus was being tested, and his objections were derived from the reports of the workmen under him. The jury found for defendant, and their judgment was sustained on appeal, the court saying that "honesty of purpose," absence of "wilful caprice," or "dishonorable design" were all that could be required. In almost all the cases this element of *good faith* is spoken of as necessary on the part of the party refusing the article. At this point the inquiry suggests itself: How is this question of good faith to be determined? Is not good faith, like everything else in the contract, at the option of one party? There is some difficulty here. The best answer is to be found in the language of a case which well illustrates the whole subject: *Daggett* v. *Johnson*, 49 Vt. 345. "He (the buyer) must act honestly and in accordance with the reasonable expectations of the seller *as implied from the contract*." (The italics are ours.)

The sale in this case was of a set of patent milk-pans, for which the buyer was to pay "if satisfied with the pans." The peculiarity of the pans was that they were to be used in a certain manner, with running water about them to graduate the temperature of the milk. The buyer used them like ordinary pans, which was of course no test, and then declared himself dissatisfied with them. It was adjudged that he must pay for them. "His dissatisfaction," it was said, "must be actual, not feigned." But it must be presumed from the analogy of the decisions reviewed in this note, that if the buyer had used the pans in the manner the contract contemplated, the court would not have made inquiry into the degree or the reality of his objections.

One case only has been found opposing this line of decision (*Folliard* v. *Wallace*, 2 Johns. 395), a contract for the purchase of real estate, for which the buyer was to pay after he was well satisfied the title was undisputed and good against all other claims. Payment was refused on the ground of an outstanding claim of title, but it was shown that this claim was unsound and the title really good. Chancellor, then Ch. Justice KENT, after showing the clearness of the title, said: "Nor will it do for the defendant to say he was not satisfied with his title without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded. If the defendant were left at liberty to judge for himself when he was satisfied, it would totally destroy the obligation, and the agreement would be absolutely void. * * * This law in this case will determine for the defendant when he ought to be satisfied."

This authority is certainly opposed to the principal case, although its force may

be lessened by the fact that the question in the case, the title to land, is one which is peculiarly within the power and duty of a court to determine.

Singerly v. *Thayer*, and the cases in accord with it, become clearer when they are put in contrast with others where the right of decision is not vested absolutely and even arbitrarily in a party to the contract.

The agreement in *Cummer* v. *Butts*, 40 Mich. 322, was for selling lumber on commision, and might be cancelled by either party "for good cause." One party became dissatisfied and ended the contract. The court below allowed the question of good cause to go to the jury. The Appeal Court reversed the judgment because it was impossible to reduce the phrase "good cause," to any legal certainty.

In *Mueller* v. *U. S.*, 19 Court of Claims 581, the agreement was to furnish building stone "at such times and in such quantities as may be required by the government." The government, contemplating a change of plan, broke off the work, causing heavy loss to the contractor. The court said that the word *required*, referred not to the unsettled purposes of the government, but to the needs of the work contemplated by the contract. In other words the working of the contract conferred no arbitrary power of refusing the stone.

In *McClamrock* v. *Flint*, 101 Ind. 278, a mill was sold on condition of return if it did not "work well." It was held necessary to state wherein the machine did not work well, because, as the court observed, "a defendant who alleges that a mill or machine does not work well simply states his own judgment." See also *Clark* v. *Rice*, 46 Mich. 308.

Between a case like this and the principal case, the distinction is plain. In the former case the sufficiency of the article, the subject-matter of the contract is a matter of fact, to be settled as questions of fact are settled—the case is one of warranty; in the latter case the sufficiency of the article is left to the judgment, call it the caprice if you will, of one party to the contract. It is a question of what the ordinary meaning of words is. The word *satisfactory*, for instance, which has been found to occur so often, has in common acceptation a subjective meaning, a reference to the attitude of the mind towards a thing, and not to the intrinsic merit of a thing.

The losing sight of the distinction between a contract, the decision of which rests with the parties, and one the decision of which devolves upon the court and jury, is at the bottom of all the trouble in the class of cases before us.

The rule laid down in the text covers the numerous instances of contracts where the judgment of a supervising architect or other expert is final as to work done, as in *Dingley* v. *Greene*, 54 Cal. 333; *Schenke* v. *Rowell*, 7 Daly (N. Y.) 286; *Kane* v. *Stone Co.*, 39 Ohio St. 1; *Hartupee* v. *Pittsburgh*, 97 Penn. St. 107; *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 Id. 618; *Cass* v. *Railroad*, 80 Penn. St. 31. At least one decision, however, denies the finality of the architect's decision: *Hurst* v. *Litchfield*, 39 N. Y. 377.

A somewhat curious point is decided in *Tetz* v. *Butterfield*, 54 Wis. 242. The work was to conform to the specifications, etc., "according to the full satisfaction of W. D., architect, and to the satisfaction of the owner." It was considered that the last clause was meant only to prevent any change of plan without sanction of the owner; as to the quality of the work the architect alone was to judge.

Another class of cases arises on contracts to build railroads where the amount of grading, etc., done is to be estimated finally by the company's engineer. In England, no agreement can shut out the jurisdiction of equity to correct erroneous statements, while here it is usually

held that an estimate in good faith is final. *Scott* v. *Avery*, 5 House of Lords 811; *Herrick* v. *Railroad*, 27 Vt. 673; *Hennessey* v. *Farrell*, 4 Cush. 267; *Condon* v. *Railroad*, 14 Gratt. 302; *Alton Rd.* v. *Northcott*, 15 Ill. 49. One case at least, however (*Kistler* v. *Railroad*, 88 Ind. 460), rules that any agreement not to resort to legal proceedings is against the policy of the law. But the case arose on an under-estimate of work done—a simple question of fact.

CHARLES CHAUNCEY SAVAGE.
Philadelphia.

Supreme Court of Indiana.

HEDDERICK v. SMITH.

A tenant who, for the better enjoyment of the leasehold, erects thereon buildings, may, at any time before his right of enjoyment ceases, remove such buildings, if the removal can be accomplished without permanent injury to the freehold.

If he neglects to remove them during his rightful continuance in possession, unless his right to do so afterwards is reserved by agreement with the landlord, he is presumed to have abandoned them, and his right ceases.

If the tenant take a new lease from the landlord without reserving the right to remove the buildings placed by him on the demised premises for his own enjoyment, he cannot at the expiration of such new term remove such buildings.

A mere extension, however, of the old lease upon the same terms will not conclude his right to remove such buildings; and the respective rights of the parties will remain the same.

APPEAL from the Marion Superior Court.

P. Rappaport, for the appellant.

F. S. Rollins, for the appellee.

The opinion of the court was delivered by

MITCHELL, C. J.—Elizabeth D. Smith, as owner of certain premises in the city of Indianapolis, brought this suit against Hedderick who was in possession, to restrain him from removing therefrom a "club house," which had been erected thereon, and other alleged fixtures, which, it was claimed, were a part of the freehold. The case was put at issue and tried by the court, the result being a finding and judgment for the plaintiff below. On appeal to the general term, the only error assigned was that the court, at special term, erred in overruling the appellant's motion for a new trial. Under the settled practice no alleged errors will be considered here, except such as were assigned at the general term: *Miller* v. *State*, 61 Ind. 502.

It is a question whether the bill of exceptions containing the evidence is certified by the judge in such manner as to entitle it to consideration here. But waiving the alleged irregularities in that regard, we find the following undisputed facts exhibited in the evidence. The plaintiff took title to the premises from her deceased husband, Ebenezer Smith. The place was known as "Volks Garden," and had upon it one building which was used as a saloon, and another called the "Club-house." The club-house was built by one Baldes while occupying as tenant of Smith. In April 1879, Hedderick, with the knowledge and consent of Smith, purchased the club-house and fixtures of Baldes, paying therefor $700 in cash.

Contemporaneously with the purchase from Baldes, he took a lease of the premises from Smith for a term of three years. Whether by the terms of this lease the right to remove the property in dispute was reserved does not appear. During the continuance of this lease Smith died, and his widow succeeded to his title. At the expiration of the term Hedderick leased the premises from Mrs. Smith, for the term of one year at a stipulated rent, payable monthly. The rent reserved for the new term was different from the old. The lease contained the usual covenants for repair by the tenant, and for the surrender of the premises at the expiration of the term, without waste. There is in it no reservation of a right to remove any building or fixtures annexed to or situate upon the land. Some repairs and alterations were made to the club-room by the tenant during his term, and he asserted the right to remove it and the fixtures which he had purchased from Baldes. Whether the building was so annexed to the freehold as to become part of it, or whether it could be removed without injury to the reversion, were propositions asserted on one hand and denied on the other. But as the finding of the court was for the plaintiff, it must be assumed here that it was. That a tenant who, for the better enjoyment of the leasehold, erects thereon buildings, may, at any time before his right of enjoyment ceases, remove such buildings, if the removal can be accomplished without permanent injury to the freehold, is well settled. It is equally well settled that if he neglects to remove them during his rightful continuance in possession, unless his right to do so afterwards is reserved by agreement with the landlord, he is presumed to have abandoned them, and his right ceases. *Cromie* v. *Hoover*, 40 Ind. 49; *Allen* v. *Kennedy*, Id. 142; *Hamilton* v. *Huntley*, 78 Id. 521; *Griffin* v. *Ransdell*, 71 Id. 440.

Assuming that the tenant had the right to remove the building and fixtures during the continuance of his first term, the question still remains, what was the effect of his taking a new lease upon different terms from Mrs. Smith, without reserving any right of removal? Without question, if there had been nothing more than an extension of the old lease upon the same terms, the respective rights of the parties would have remained the same. The acceptance of a new lease upon different terms was, however, the creation of a new tenancy. It would seem that when the new lease was made, it was a lease of the whole estate as it then existed, including the club-house now in dispute, with whatever else was a part of the freehold. This estate the lessee covenanted to maintain in repair, and at the expiration of his term surrender up. It results from the terms of the lease, that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination, and the lessee will not be permitted to say that part of the premises leased was in fact a trade fixture, erected by him under a previous lease, and that he has the right, against the face of his contract, to sever and remove it. To permit the tenant to do this, would, in effect, be to permit him to deny the title of his landlord to part of the demised premises. And if he may deny his title to a part, why not to the whole? The acceptance of the new lease was an effectual surrender of the old, together with the estate, and all other rights which the old lease secured to him. Thenceforth he was in as of a new estate, which is to be measured by the condition of things existing when it commenced, and by the covenants, conditions and reservations contained in the new lease, from which the rights of the parties must be determined and regulated. Upon this subject the elementary writers are agreed. Accordingly, the rule is stated by an approved author, thus: "But while a tenant may remove trade fixtures at any time during his original term, or any renewal thereof, yet, although he continues in possession after the expiration of his original term, if he holds under a new lease, in which no provision for the removal of the fixtures is made, he is treated as having abandoned his right thereto:" Wood. Landl. and Ten., § 532. So, also, in Tayl. Landl. and Ten., § 552, the author says: "If a tenant, at the close of his term, renews his lease, or surrenders it for the purpose of acquiring a fresh interest in the premises, he should take care to reserve his right to sever under the old tenancy; for when his continuance in possession is under a

new lease or agreement, his right to remove fixtures is determined, and he is in the same situation as if the landlord, being seised with the land, together with the fixtures, had demised both to him."

The principles above stated are sustained by the adjudications of the courts in the following, among other well-considered cases: *Loughran* v. *Ross*, 45 N. Y. 792; *Watriss* v. *First Nat. Bank, &c.*, 124 Mass. 571; *Jungerman* v. *Bovee*, 19 Cal. 355.

Judgment affirmed, with costs.

This note will be confined to those cases touching the time when a tenant must exercise his right to remove fixtures placed by him on the freehold. If the tenant has the right to remove the fixtures, when must he exercise it?

The reasons for the rule allowing the tenant to remove the fixtures has been well stated by Judge COOLEY: "The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all, is based upon a corresponding rule of public policy, for the protection of the landlord, and which is—that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant:" *Kerr* v. *Kingsbury*, 39 Mich. 150; s. c. 33 Amer. Rep. 362; 17 Amer. L. Reg. 638.

The expression "during the term" is frequently used in the cases, and has its origin in an early case. Thus in 1804, in the Year Book, Henry VII. 136, pl. 24, the rule is stated, "And if the lessee for years makes such a furnace for his advantage, or a dyer makes his vats and vessels to carry on his occupation during his term, he may remove them; but if he suffers them to remain fixed to the earth after the end of his term, then they belong to the lessor." So in *Poole's Case*, 1 Salk. 368, it was said by Lord HOLT that "during the term the soapboiler might well remove the vats; but after the term they become a gift in law to him in reversion, and are not removable.

In *Lyde* v. *Russell*, 1 B. & Ad. 394, Lord TENTERDEN said: "In a very excellent treatise on the law of fixtures by Mr. Amos and Ferrard (p. 87), it is laid down that a tenant must use his privilege in removing fixtures during the continuance of his term; for, if he forbear to do so within this period, the law presumes that he voluntarily relinquishes his claim in favor of the landlord." After citing the two cases last cited above, he proceeded: "According to these authorities then, the property in fixtures, which would be in the tenant if he removed them during the term, vests in the landlord on the determination of the term." See also *Hallen* v. *Runder*, 1 C., M. & R. 266; *Lee* v. *Risdon*, 7

Taunt. 188; *Mackintosh* v. *Trotter*, 3 M. & W. 184.

In *Weeton* v. *Woodcock*, 7 M. & W. 14, 19, ALDERSON, B., said: "The rule to be collected from the several cases decided on this subject seems to be this—that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right to consider himself a tenant. That was the rule on which this court acted in *Minshall* v. *Lloyd*, 2 M. & W. 460, in which PARKE, B., in giving his judgment, puts it on the ground that there was 'no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants. In the present case, also, this boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants."

In *Merritt* v. *Judd*, 14 Cal. 59, the rule is stated in the following language: "The tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself a tenant; and, we have seen, beyond this the great weight of authority does not go:" Citing *Welton* v. *Woodcock*, 7 M. & W. 14.

In *Leader* v. *Homewood*, 5 C. B. (N. S.) 546, Mr. Justice WILLES, commenting on *Weston* v. *Woodcock*, and *Penton* v. *Robart*, 2 East 88, said: "It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz.: that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures." So in *Mackintosh* v. *Trotter*, 3 M. & W. 184, Baron PARKE, after stating whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on the term." And in the Massachusetts case, referring to these English cases, it was said: "It is clear from these cases that the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still in contemplation of law, in occupation as tenant under the original lease, and, as Baron PARKE says, under what may be considered an excrescence on the term, that is, as tenant at sufferance: *Watriss* v. *First Nat. Bank of Cambridge*, 124 Mass. 571; s. c. 26 Amer. Rep. 694.

From these cases, and others to be cited, it may be laid down as a general rule, that so long as the tenant occupies the premises previously leased under or by virtue of the lease, during the continuance of which he placed the fixtures on the demised premises, he may remove the fixtures; but the instant he ceases to hold the premises under or by virtue of the lease, his right is at an end.

To this there is an exception. Thus, "where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life, or at will, fixtures may be removed within a reasonable time after the tenancy is determined:" *Watriss* v. *First Nat. Bank of Cambridge*, *supra*; *Ellis* v. *Paige*, 1 Pick. 43, 49; *Doty* v. *Gorham*, 5 Id. 487, 490; *Martin* v. *Roe*, 7 E. & B. 237; *Reynolds* v. *Shuler*, 5 Cow. 323; *Loughran* v. *Ross*, 45 N. Y. 792; s. c.

6 Amer. Rep. 173; *Elwes* v. *Mawe*, 3 East 38; s. c. 2 Smith's L. C. 228; *Whiting* v. *Brastow*, 4 Pick. 310; see *Penton* v. *Robart*, 2 East 88.

The taking of a new lease while in possession under a previous lease has been regarded such a surrender of the possession that it was a release by the tenant of his right to remove the fixtures placed there during such previous lease. It is construed as a lease of the freehold with the fixtures, especially if the new lease contains any terms different from the first lease. In *Watriss* v. *First Nat. Bank of Cambridge*, *supra*, it was said: "But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of or holding over under an existing lease; it is creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate, and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old."

In *Loughran* v. *Ross*, *supra*, it was said: "The surrender of the premises, after the expiration of the lease, is such an abandonment as vests the title in the landlord. In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the building and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises. A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant, accepting a lease of the premises without excepting the buildings, takes a lease of the lands with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it." See *Eten* v. *Luyster*, 60 N. Y. 252, 261.

In *Watriss* v. *First Nat. Bank of Cambridge*, the plaintiff leased the premises to the Harvard Bank on January 1st, 1861, for five years at a fixed rent, with the privilege of an additional term of five years on the same conditions. The lessee constructed a fire-proof safe or vault and placed other fixtures on the premises. The lessee (the bank) was afterwards changed into a national bank under the name above given. The new bank elected to extend the lease as above stated, and continued in occupation until October 7th, 1870, when a new lease was entered into by the parties for five years from January 1st, 1871, at an increased rent, and the new lease contained the same provisions as the old one, with an additional covenant in case of fire, that the rent was to cease until the repairs were completed. About November 8th, 1875, the defendant (the bank) removed the safe and fixtures. Under these facts it was held that such removal was unlawful.

Other cases on a similar state of facts are decided in the same way: *Marks* v. *Ryan*, 73 Cal. 107; *Jungerman* v. *Bovee*, 13 Ill. 345; *Abell* v. *Williams*, 3 Daly 17. *Deeble* v. *McMullen*, 8 Ir. Com. L. 355; *Shepard* v. *Spaulding*, 4 Met. 416; *Darrah* v. *Baird*, 40 Leg. Int. 121; s. c. 22 Amer. L. Reg. 533. See generally, *Thomas* v. *Crout*, 5 Bush 37; *Dingley* v. *Buffum*, 57 Me. 381; *Youngblood* v. *Harris*, 68 Ga. 630.

A lessee, who had erected fixtures for the purposes of trade upon the demised premises, and afterwards took a new lease to commence at the expiration of his former one, which new lease contained a covenant to repair, it was said, was bound to repair those fixtures unless strong circumstances existed to show that they were not intended to pass under the general words of the second demise. *Thresher* v. *East London Water-Works*, 2 B. & C. 608.

A suit in ejectment was commenced February 8th; on the 19th the defendant allowed judgment to go by default upon the lessor of the plaintiff entering into the following agreement: "In consideration of Messrs. J. & G. B. [the tenants], not appearing in this action, I hereby undertake not to issue a writ of possession until after the 25th day of March next." It was held that the defendants were, by the agreement, precluded from removing fixtures put up by them on the premises, in the interval between February 19th and March 25th, the fair construction of the agreement being that the premises should be given up in the same state that they were in on the day the judgment was signed. *Heap* v. *Barton*, 12 C. B. 274; s. c. 16 Jur. 891.

Fitzherbert v. *Shaw*, 1 H. Bl. 258, is considered one of the leading cases on this subject. There the purchaser of land brought an ejectment suit against the tenant from year to year, and the parties entered into an agreement that judgment should be signed for the plaintiff with a stay of execution until a given period. It was held that the tenant could not in the interval remove fixtures from the premises, which he had himself erected during his term, and before the action was brought.

A tenant at will of a lessee of land erected a small building on the land resting on stone posts sunk in the ground. The building was erected with the knowledge and consent of the lessor of the ground, and with the understanding on his part, and on that of the tenant at will, that it would be removed as a trade fixture. Both tenancies expired at the same time, and neither tenant removed the buildings; the lessor resumed possession of the premises, and soon after the former tenant at will hired it with other land at an increased rent. It was held that the tenant at will could not, after this, remove the building. *McIver* v. *Estabrook*, 134 Mass. 550.

The doctrine of the principal case has not always been followed: *Kerr* v. *Kingsbury*, 39 Mich. 150; s. c. 33 Am. Rep. 362, is a notable instance of this dissent. In that case the following reasoning was used, after referring to the general rule that the fixture must be removed before the term expires or possession is given: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.'"

This was a case where the new lease was accepted from a new landlord, and it was held that the tenant was not prohibited from removing trade fixtures placed on the premises during the continuance in force of the first lease; and the court cites the language used in *Davis* v. *Moss*, 38 Penn. St. 346, 353, where it is said, "if a tenant remains in possession after the expiration of his term, and performs all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." To the same effect is *Devin* v. *Dougherty*, 27 How. Pr. 458.

If the first lease is a written one, and the second only in parol, the effect upon the right to remove the fixtures is the same: *Loughran* v. *Ross*, *supra*.

An exception to the general rule, that the tenant must remove the fixtures *during the term*, has already been noted. In one case it was said of this rule, "to apply it to a party in possession under a lease revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another:" *Northern Cent. Ry. Co.* v. *Canton Co.*, 30 Md. 347; s. c. 8 Am. L. Reg. 540. So that where a landlord agreed to sell a trade fixture for the tenant's benefit, and the tenant left it after the expiration of his time, and the landlord failed to sell it, it was *held* that the tenant had a reasonable time, after the term, to remove it, and that his creditors had the same right of attachment: *Torrey* v. *Burnett*, 9 Vroom 457; s. c. 20 Am. Rep. 421.

So, where a lease was given by an agent without sufficient authority during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided that the tenant became a tenant at sufferance, and could remove his fixtures within a reasonable time after such termination: *Antoni* v. *Belknap*, 102 Mass. 193.

So the same is true in case of a forfeiture of a lease: *Weeton* v. *Woodcock*, 6 M. & W. 14.

Likewise if the landlord, before the expiration of the term, enjoins the tenant from removing his fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove them: *Goodman* v. *Hannibal & St. Joseph Rd. Co.*, 45 Mo. 33.

Certain premises were let for no certain time, for a nursery, for raising trees and plants until ready to be transplanted. It was ruled that the trees must be removed within a reasonable time after the lease was terminated: *King* v. *Wilcombs*, 7 Barb. 263; and if the term is certain, then before possession is yielded: *Brooks* v. *Galster*, 51 Barb. 196.

But where the lease is thus unexpectedly terminated, it would seem that the fixtures must be removed *before possession is yielded*, else the effect will be an abandonment: *Lerader* v. *Homewood*, 5 C. B. (N. S.) 546; *Gibson* v. *The Hammersmith Rd. Co.*, 32 L. J. Ch. 337, 342; *Heap* v. *Barton*, *supra*; *Martin* v. *Roe*, *supra*; *Weeton* v. *Woodcock*, *supra*. See *Sumner* v. *Bromilou*, 34 L. J., Q. B. 130; *Minshall* v. *Lloyd*, 2 M. & W. 450.

W. W. THORNTON.

Crawfordsville, Ind.

Circuit Court, E. D. Louisiana.

SEIGNOURET *v.* HOME INS. CO. ET AL.

The capital stock of a corporation cannot be reduced except by express legislative authority.

A statute giving authority to stockholders to make modifications, additions or changes in their act of incorporation, or to dissolve it, with the assent of three-fourths of the stock, does not confer upon them power to reduce the capital stock.

IN CHANCERY.

E. H. Farrar and *E. B. Kruttschnitt*, for complainants.

Chas. B. Singleton, Richard H. Browne, and *B. F. Choate*, for defendants.

The opinion of the court was delivered by

PARDEE, J.—The suit is brought to restrain the Home Insurance Company from reducing its capital stock. The question is one of the power of the company, and not of the propriety of its proposed action. It is well-settled corporation law, "that a corporation has no implied authority to alter the amount of its capital stock where the charter has definitely fixed the capital at a certain sum. The shares of a corporation can neither be increased nor diminished in number, or in their nominal value, unless this be expressly authorized by the company's charter." Morawetz Priv. Corp., § 230. See Tayl. Priv. Corp., § 133; Green's Brice's Ultra Vires 158; *Granger's Life Ins. Co.* v. *Kamper*, 73 Ala. 325. And it is understood that the same law prevails in Louisiana. See *Percy* v. *Millaudon*, 3 La. 569. Article 239 of the constitution of Louisiana prohibits increase of stock of corporations, except in pursuance of general laws. See, also, act 26th of 1882, of the Laws of Louisiana, specifically providing the mode and manner by which the stock of corporations may be increased. See, also, section 693, Rev. St. La. From these Louisiana authorities it seems clear that the authority to increase the capital stock of a corporation must be express. It would also seem that, as the constitution and the law thereunder provide for the increase of the stock, but are silent as to a decrease, the power to decrease the stock of a corporation was intentionally denied.

All the authorities examined, and the nature of things, are to the effect that a decrease of capital stock affects injuriously more parties

and interests than would an increase; increase of capital being generally considered to be beneficial to shareholders and creditors alike—to the former as tending to diminish and not to add to their individual risks; to the latter as increasing the amount of their security. See Green's Brice's Ultra Vires 160.

In *Percy* v. *Millaudon, supra*, Judge MARTIN, speaking of the attempted reduction of the capital of the Planters' Bank, says: "Creditors and customers have a claim to the preservation of the capital in its original integrity, for the faith of which they accept the notes of the institution, deposit their money, and lodge paper for collection. So has the public, on account of the advantages which the legislature has stipulated the bank should afford, as a consideration for the immunities and privileges which the charter confers. So have the stockholders, on account of the profits which they have a right to expect on the investments they have respectively made."

I do not understand counsel for defendant to seriously deny that the authority to increase or decrease the amount of capital stock of a corporation must be express; but he claims that to corporations created under the general law, as the Home Insurance Company was, the power to increase or diminish stock is given by section 687, Rev. St. La., which reads:

"It shall be lawful for the stockholders of any corporation, at the general meeting convened for that purpose, to make any modifications, additions, or changes in their act of incorporation, or to dissolve it with the assent of three-fourths of the stock represented at such meeting; any such modification, addition, change, or dissolution shall be recorded as required by the preceding section."

And he contends that his construction of the power given in said section has been sanctioned by long-continued practice and usage among the corporations of the state, and the case proves that a number of leading insurance companies in the city of New Orleans, under such construction, have either increased or decreased their capital stock. Some have done both. The legislative construction of section 687 can be found in the proviso of section 693, "provided that nothing in this act shall be so construed as to authorize an increase in the capital stock of any railroad company." The judicial construction should be found in the reports of adjudged cases, but an examination of the Louisiana Reports shows no case where the question has been raised. It is a fair inference, then, that in every

case where there has been an increase or decrease of capital stock, under authority claimed to be given by section 687, there has been unanimous consent of stockholders and creditors, which makes a very different case from the present one.

While the Louisiana courts have not been called on to determine whether an increase or decrease of the capital stock of a corporation is within the scope of section 687, and there are few if any cases from sister states, the English courts have construed similar provisions against the claimed authority.

In *Smith* v. *Goldsworthy*, 4 Adol. & E. (N. S.) 430, it was held that a provision "that for the better conduct and management of the affairs of the company, it should be lawful for a special general meeting called for the purpose, from time to time, to amend, alter, or annul, either wholly or in part, all or any of the clauses of the said deed, or of the existing regulations and provisions of the company," did not authorize a reduction of the number and value of the shares of the company. See, also, *Droitwich Patent Salt Co.* v. *Curzon*, L. R., 3 Exch. 35; *In re Ebbw Vale Steel, etc., Co.*, 4 Ch. Div. 827; *In re Financial Corporation*, (*Holmes' Case*), L. R., 2 Ch. 714; *Society* v. *Abbott*, 2 Beav. 559. For American cases, see *Granger's Life Ins. Co.* v. *Kamper*, 73 Ala. 325; *Salem Mill Dam* v. *Ropes*, 6 Pick. 23.

The power to dissolve does not carry the power to change the capital stock. Reducing the capital stock is practically the dissolution of the company and the organization of a new company. It did appear to me on the hearing that the proposed action of the home company was not a reduction of the capital stock, for the capital and assets of the company are to remain the same. It seems that since the organization the capital has been nominal, to the extent that only by estimation has the actual capital of the company been equal to the par value of the shares, and the proposed action now is but to write off the par value of the shares so that the par value and the estimated value may be equal, the actual capital not being affected—the actual stock being the same after the proposed action as before. It seems clear to me that the writing off the value of shares is such an infringement of the rights of property as can only be accomplished by consent, or a clear power given in the charter. However, I have concluded to treat the case as the parties have presented it, and not from this latter view. It seems perfectly clear

to me that the proposed action of the Home Insurance Company cannot be lawful over the protest of dissenting stockholders.

The injunction issued in the case will be perpetuated in the decree.

Reductions of capital stock of a corporation are not so common as increases thereof. Nevertheless there are a few cases in point.

In *Smith* v. *Goldsworthy*, 4 Q. B. 430; 12 L. J., Q. B. 192, the deed of settlement of a company incorporated by a special act declared, that it should be lawful for "a special general meeting to amend, alter or annul, either wholly or in part, any or all of the existing provisions of the deed, and to make any new or other regulations in lieu thereof; and such new regulations should" "be binding and conclusive upon the shareholders." The deed provided that the capital should be 2,000,000*l*., divided into 20,000 shares of 100*l*. By resolutions, passed and confirmed at meetings duly convened and holden, it was resolved that the capital should be reduced to 1,000,000*l*, in 50*l*. shares. The Court of Queen's Bench *held* that such reduction was *ultra vires* of the company. DENMAN, C. J., said: "The amount of shares is properly part of the constitution of the company, and does not strictly depend upon any clause, resolution or provision of the deed. The alteration of shares seems, therefore, not to come within the meaning of the 29th clause (above quoted). * * * The defendant further argues that the effect of the resolution reducing the shares was to dissolve the company. We do not think any such effect followed, but rather that they were simply void and inoperative. We think the shares always were, in point of law, 100*l*. shares."

A similar conclusion is reached in *Droitwich Salt Co.* v. *Curzon*, L. R., 3 Ex. 42. In this case the capital stock was partially paid, and it was undertaken to reduce the nominal capital to the sum actually paid. KELLY, C. B., in refusing to permit the reduction, said: "If such a proceeding were permitted, the shareholders' liability would be limited not, as was intended, by the amount of their shares, but by the amount of the already paid up portion of their shares. Justice, the language of the act and the intention of the legislature, alike forbid an interpretation which would lead to such a result." It was further decided in this case, that if a new company, formed under a general incorporation act, could not, under that act, reduce its capital stock, an old one coming in to share the benefits of such act could not do so.

In re Ebbw Vale S. I. & C. Co., 4 Ch. Div. 829, arose under the English Companies Act of 1867, which empowered a company to reduce its capital, and required the reduction to be confirmed by order of court, and to be registered, &c. The nominal capital of the company was divided into shares of 32*l*. each, all of which were subscribed for. On all the shares (except a few which were paid in full) 29*l*. per share was paid, leaving 3*l*. per share to be called up. The capital having been partially lost through the depreciation of the property which represented it, the company desired to write off the loss, and for that purpose proceeded to take steps under the companies act for reducing their nominal capital. They accordingly resolved that the nominal capital should be reduced to a specified amount, and that each 32*l*. share should be reduced to 23*l*. by the extinction of 9*l*. per share, to the intent that the existing liabitity of 3*l*. per share on all the shares except those fully paid, should be preserved, that is, the new shares were to be deemed full paid to

the extent of 20*l.*, leaving the 3*l.* still due.

The application was refused on the ground that, as the nominal liability of the stockholders, namely the 3*l.* per share unpaid remained still due, there was in fact no reduction of the nominal capital. JESSEL, M. R., said: "Now, first of all, what does 'reduce its capital' (in the statute) mean, standing alone? I should think it meant an actual reduction. This is not an actual reduction because the capital has been lost. It is merely acknowledging that to be lost which is lost; 9*l.* per share is lost; 3*l.* per share remains to be paid up, and the company wish that 3*l.* to be still called up. All they want is to write off 9*l.* per share as loss. That is not reduction of capital; part of the capital has gone already; it has been reduced by a very unpleasant process. It requires no resolution of the company to do that:" *In re Ebbw Vale S. I. & C. Co.*, 4 Ch. Div. 832.

In *In re Financial Corporation*, L. R., 2 Ch. 714, the memorandum of association of a company provided that the capital should be 3,000,000*l.*, divided into 30,000 shares of 100*l.* each, "subject to be increased or modified," and the articles gave the board of directors power to divide the shares into shares of smaller amount. The directors exercised such power, and converted each 100*l.* share into five 20*l.* shares. *Held*, that such conversion was unauthorized and void, as not being authorized by the companies act.

It is, however, sometimes desirable that the capital stock of a corporation should be reduced. Accordingly, provision therefor has been made in some states by statute. See New York Statutes, for example (chapter 264, Laws 1878, N. Y.), providing in substance that whenever any company shall desire to call a meeting for "diminishing the amount of its capital stock, notice shall be published and served; a vote of two-thirds of all the shares of stock shall be necessary; a certificate shall be made and verified showing (1), the amount of capital actually paid in; (2), the amount of debts and liabilities; (3), the amount to which the capital stock shall be diminished; which certificate must be filed, with the approval of the comptroller, to the effect (1), that the reduced capital is enough for the corporate purposes; (2), that it is in excess of all debts and liabilities of the company, exclusive of debts secured by mortgage, and (3), that the actual market value of the stock before reduction was less than par. It will be observed that the objects sought to be obtained by this enactment were the protection of corporate creditors and the assurance of a fund sufficient to carry out the corporate purposes, and that it permits a reduction where either it was originally fixed at too high a sum or has become impaired, so that the nominal exceeds the actual sum. But it does not permit the distribution among stockholders of a sum equal to the difference between the nominal and the reduced capital, although if that sum may be taken out and yet leave capital of the company unimpaired and the creditors secure, it may be divided among shareholders as a surplus entitled to be distributed in dividends. *Strong v. Brooklyn Cross T. Rd. Co.*, 93 N. Y. 426.

And a statute (Gen. Stat. N. H., chap. 354, sect. 6) which authorizes a corporation, at any meeting called for the purpose, to reduce its capital stock and the number of shares therein, does not empower such corporation to effect such reduction by purchasing shares of a particular subscriber; unless a course is adopted which will work exact and even justice to all the owners of stock, the statute is inoperative: *Currier v. Lebanon Slate Co.*, 56 N. H. 262; see also *Gill v. Balis*, 72 Mo. 424; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; see also Pennsylvania Statute of 29th April 1874, sect. 23, P. L. 83.

There are not many cases bearing directly on the decrease of corporate stock. But there is a large number where such stock has been increased, and the validity of the proceeding has been passed upon. Incidentally, some of these cases discuss reduction of capital stock. And it is well settled that neither increase nor decrease of capital stock is within the power of the company, except where authority so to do is expressly conferred. See *N. Y. & N. H. Rd. Co.* v. *Schuyler*, 34 N. Y. 30; *Knowlton* v. *Congress, etc., Co.*, 14 Blatch. 364; 103 U. S. 49; *Railway Co.* v. *Allerton*, 18 Id. 235; *Oldtown Rd. Co.* v. *Veazie*, 39 Me. 571; *Spring Co.* v. *Knowlton*, 103 U. S. 49; 57 N. Y. 518.

ADELBERT HAMILTON.

Supreme Court of Michigan.

ATTORNEY-GENERAL v. BOARD OF COUNCILMEN OF THE CITY OF DETROIT.

A statute providing for the appointment in a city of a board of four commissioners to take charge of elections, two members thereof to be selected from each of the two leading political parties of the city, such board to appoint registers and inspectors of election from each of the two leading political parties is unconstitutional, as requiring an unlawful test for the holding of a public office.

Party representation being the main object of such a law, the court cannot treat it as not essential and sustain the commission by allowing the selection of its members without such a test.

The creation by statute of a board of commissioners for a city, having control of all the municipal elections and the appointment of election officers, is unconstitutional, as being a delegation of governmental powers and in violation of the settled principle that all officers exercising powers of government and control over municipal affairs must derive their power and office either from the people directly or from the agents or representatives of the people.

APPLICATION for mandamus.

The opinion of the court was delivered by

CAMPBELL, J.—The attorney-general applies for a mandamus to compel the respondents to take action upon certain nominations made by the mayor of Detroit of four persons, two being Republicans and two being Democrats, to act as a board of commissioners of registration and of election for the city of Detroit. Respondents refused to consider the nominations because they regarded the statute which provides for such board as unconstitutional and invalid. To an order to show cause they interpose that ground of defence. No other question is of much importance in the case. The necessity of an immediate decision, in order to allow time for the action of the city authorities in season for the coming election,

made it impossible for the court to do more than announce its determination on rendering judgment in favor of respondents, as any oral statement in brief form of the grounds of their action would have been liable to some misapprehension. It was therefore thought best that the members of the court should express their views more formally in writing. The statute in question purports to amend chapter 2 and some sections of chapter 3 of the charter of Detroit, as revised in 1883. Chapter 2, which refers to the registration of voters, is entirely superseded by the present act, as is also so much of chapter 3 as provided for the choice of inspectors of election. The new statute undertakes to provide a board of commissioners to appoint ward registers and inspectors, who are to perform the duties formerly imposed on the boards made up of aldermen and their appointees, and of persons elected by the voters. The board thus provided for is required to be composed of four members holding office for four years, the first board being appointed for one, two, three and four years respectively, so that one vacancy shall be filled each year. They are all to be resident electors of the city, and two members thereof to be from each of the two leading political parties of the said city. They are required, two weeks before the time fixed by law for the meeting of boards of registration of voters, to appoint two qualified electors of each voting district, one from each of the two leading political parties of the said city, to act as registers, and form a district board of registration. The various district boards, sitting together, are to constitute a city board of registration. The board of commissioners are to fill any district vacancies by persons of the same political party to which the absentee belongs. The commissioners are also required to appoint for each voting district two inspectors, one from each of the two political parties "represented in the common council of said city," the electors choosing a third. Vacancies in any board of inspectors are to be filled by *viva voce* vote of the electors, but each vacancy must be filled by a person of the same political party as the absentee. The commissioners also appoint the various clerks of election, but have no immediate part in the work of registration by action or supervision.

The statute makes a number of new provisions upon the subject of registration and election, which were more or less discussed on the argument, but which would only be important if the law were not held to be entirely invalid, as we deem it to be. These several

provisions will not, therefore, be dwelt upon. The invalidity of the statute was chiefly based on the argument upon the illegality of creating a board with such powers as those conferred by the statute, and required to be composed of equal numbers of two political parties appointed as such members, and ineligible without such party connection. Relator insists that the legislsture, under its power to pass laws to preserve the purity of elections and guard against abuses of the elective franchise, has discretionary power over the methods, and that, even if the partisan disqualification is improper, the court may treat it as not essential and sustain the commission by allowing the selection of its members without any such test. Neither of these grounds is tenable, in our view of the constitution.

In order to appreciate the bearing of the considerations presented on the case, it will be necessary to make some reference to the general elective system of the constitution itself. It is needless to explain that under that system, the whole scheme of government, in every department, depends upon the action of the qualified voters in their electoral districts. All male citizens of lawful age, and some whose United States citizenship is incomplete, are entitled after a certain term of residence to vote in the township or wards in which they reside. Every vote, for any purpose whatever, is required to be cast in such township or ward. The only exception is in case of soldiers in the field during the war. All legislation imposing restraint or conditions upon voting must conform to the other clauses and provisions of the constitution. No part of that instrument can be allowed to override or destroy any other part. It is also well settled that our state polity recognises and perpetuates local government through various classes of municipal bodies, whose essential character must be respected, as fixed by usage and recognition when the constitution was adopted; and any legislation for that purpose which disregards any fundamental and essential requisites of such bodies has always been regarded as invalid and unconstitutional. There is nothing in the constitution which permits the legislature, under the desire to purify elections, to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. And as the right of voting is the same everywhere, it is obvious that the conditions regulating the manner of exercising it must be the same in substance everywhere. The machinery of the government differs in its details in cities, villages, and townships, and of course in methods and officers to administer

the election laws. But it cannot be lawful to create substantial or serious differences in the fundamental rights of citizens of different localities in the exercise of their voting franchises.

It is also a most important principle under our constitutional system that no one shall be affected in any of his legal and political rights by reason of his opinions on political subjects or other matters of individual conscience. The political right to freedom of belief and expression is asserted in the most distinct way, and applies to every privilege which the constitution confers. No one has ever supposed that any new condition could be added to those which the constitution has imposed on the right of suffrage, beyond such as are necessary to guard against double voting, or to prevent its exercise by those who are not legal voters. The only legitimate object of registration laws is to secure a correct list of actually qualified voters. Any attempt to inquire into the sentiments of the voters is not only an abuse, but one which it is the chief purpose of the ballot system to prevent. The ballot is a constitutional method which cannot be changed, and its perpetuation means the security to vote without any inquisition into the voter's opinion of men or measures; and it would be entirely meaningless if the voter's choice of candidates for any office must be made from any particular party or number of parties. But the constitution has made this more specific (although this was hardly necessary), by providing, after giving the form of an official oath, that "no other oath, declaration or test shall be required as a qualification for any office or public trust."

It is manifest that any important function of government comes under one or the other of these heads of "office" or "public trust." The board of registration commissioners consists under this statute of persons holding permanent offices. The district registrars, clerk and inspectors perform functions connected with the most vital and important action of citizens in their capacity as choosers of the officers of government. The constitutional rule covers them all, literally as well as impliedly.

It was urged on the argument that if the term "test" can be held applicable to inquiries into party affiliation, it is equally applicable to those other qualifications often required for public service, such as education, scientific acquirements in surveyors and other specialists, legal knowledge in law officers, and the like. But this is not so. Not only is it evident from the other provisions in this clause that all the exemptions referred to are such as would be appli-

cable in all sorts of offices, but the use of the word "test" is especially significant, because its recognised legal meaning in our constitution is derived from the English test acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of the framers of constitutions. If this were not so, and if the power of the legislature in imposing conditions of office is at the same time only restrained by express clauses applying in terms to officers and to no one else, it would not be difficult for any dominant party controlling the legislature to perpetuate its power until overthrown by revolution. But such discriminations are as repugnant to the rights of voters in selecting as to the rights of those chosen in assuming office, and this clause is but an additional assertion of a principle found in other parts of the constitution, expressed or clearly implied. In the case of *People* v. *Hurlbut*, 24 Mich. 44, it was not disputed by any of the judges who referred to the matter, that it would not be lawful to confine the choice of officers to particular parties, although two of the judges thought that the provision in that particular case was capable of being eliminated from the statute. And it is claimed, in the present case, that the present law is declared and intended to be non-partisan, and that the board may be chosen without reference to this restriction of party membership.

It is altogether likely that the framers of the law were of opinion that the evils of partisan action, and the temptation to carry it to abusive extremes, would be lessened by requiring that one party should not monopolize the offices, but that two should share them. No one can doubt the advantage of impartiality in public action. But parties, however powerful and unavoidable they may be, and however inseparable from popular government, are not and can not be recognised as having any legal authority as such. The law can not regulate or fix their numbers, or compel or encourage adherence to them. Many good citizens form no permanent party ties, and when elections are close, the effort of each party is to detach votes from the friends of the other. Where there are two parties larger than any other, the success of either is very often gained by coalition with a third one. In local matters party allegiance is not uncommonly laid aside for the time being, so that it cannot be said that any party is represented in the election. However well meant such a statute as that before us may be, it distinctly makes party adhesion a condition of office; and not only so, but it puts all but

the two favored parties beyond the possibility of representation, if the law is obeyed.

It is equally clear that this party representation is the essential purpose of the law and that the other changes are merely subsidiary. There are some changes in detail, but the main purpose can not be mistaken. The partisan qualifications are made emphatic in regard to all the offices. It is impossible for any candid person to read the act and believe that the real legislative design can be carried out, by leaving the councilmen and mayor at liberty to choose commissioners from a single party, or for the commissioners to appoint registers and inspectors without distinction of party, at their pleasure, and it would need no great sagacity to see that if such unlimited power were vested in a body made up as this body might then be constituted, all of the old evils would remain, and would be made worse by the absence of any responsibility to the voters of the precincts.

In my judgment, the creation of a board with such powers as are given to this board is quite as serious an infringement of the constitution as the partisan clauses, and much more dangerous. This board is made by the statute the repositary of some of the most important powers of government. It has the entire control, directly or indirectly, of the elections on which all the departments of government depend. It has the appointment of officers who can deprive any man of his vote at any election, if they see fit to do so, without any adequate means of redress to save it. While it is unavoidable that a voter's rights at election must, in case of dispute, be disposed of summarily, it is all the more necessary that the tribunal which decides on so sacred a right should be made up in harmony with representative and popular institutions.

While boards are not uncommonly created for the more convenient management of the business interests of the municipalities, it is a principle universally settled in our system that all officers and functionaries exercising power of government and control over political action must derive their power and office either from the people directly, or from the agents or representatives of the people. The officers of towns and cities have always been so created. The discretion of a political body or functionary can not be delegated and sub-delegated indefinitely. Here the choice of ward officers is made, not by the people of the ward, nor by the chosen officers of the city, but by persons who are themselves appointees of a part

of the city government. No doubt there are many ministerial powers which can be deputized. But a governing body cannot deputize others to perform the governing functions, and the legislature cannot authorize it to do so without destroying the character of the corporation which is required to be preserved. It has always been held in this state that the municipalities which can be created by our legislature must be such in substantial character as they have been heretofore known. Up to this time, and ever since elections were first held in Michigan, they have been not only localized in some municipal division, but regarded as municipal action, and supervised and managed by municipal officers, either directly elected, or else appointed by those who have been elected Such a board as this, which is in no sense a mere agency of the city, is foreign to our system. If it can be created in a city, it can just as well be created in a county, or for the state. When the election ceases to be a municipal procedure, the whole foundation of municipal government drops out. And a municipality which is not managed by its own officers is not such a one as our constitution recognises.

As the defects which have led to a refusal of a mandamus in this case invalidate the whole law, there is no occasion to consider anything else. In my opinion either of them is fatal.

CHAMPLIN and SHERWOOD, JJ., concurred.

MORSE, C. J.—The ostensible primary object of the law under consideration was to preserve the purity of elections and throw additional safeguards around the ballot-box. Such a law should be sustained, unless in plain violation of the letter or spirit of the constitution. Every good citizen, regardless of political belief or party action, ought to and does desire that the right of suffrage shall be amply protected against hindrance or obstruction to the legal voter, as well as against the fraudulent exercise of the elective franchise. The security and permanency of good government also depend upon it. We can take judicial knowledge, I think, that political corruption exists, and that there has been, and is liable to be, a dishonest depositing and an unfair counting of ballots. There is no doubt but legislation is needed to protect and purify the exercise of this, one of the highest privileges of the citizen. The constitutionality of this act, which is in the form of an amendment to the charter of the city of Detroit, was attacked upon the argument in

this court upon four grounds, namely: (1) That it is in conflict with the provision of the constitution that "no law shall embrace more than one object, which shall be expressed in its title. (2) That it violates another provision of the constitution, to wit: "No law shall be revised or altered or amended by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length." (3) The form of registration prescribed is not in harmony with the constitutional qualifications of electors in this state. (4) The act is wholly void because of the political tests or qualifications of the registration and inspection of officers.

I am not satisfied that the two first objections are tenable.

As to the third objection, while I believe the form prescribed not applicable to our election laws, and one that would do more harm than good, creating confusion instead of certainty, and having a tendency to hamper and perhaps to prevent the exercise of the elective privilege by the legal voter in certain cases, and therefore unconstitutional, yet, under the rule uniformly applied to statutes, it would not defeat the operation of the remainder of the law, as I regard the form of registration rather as an incident to, than as the main principle of, the act.

The fourth objection to the law, it seems to me is fatal. The act provides, in substance, that the board of councilmen of the city, upon the nomination of the mayor, shall appoint a board of commissioners of registration and election in and for the city of Detroit, who shall consist of four resident electors, and whose term of office shall be four years. This board of commissioners have placed wholly in their hands the appointment of the district boards of registration in every voting precinct in the city. They have also the absolute power of appointment of two of the three election inspectors in every voting district, leaving the electors the poor privilege of choosing the other upon the opening of the polls. Besides defining the powers of said boards of commissioners, registration and election inspectors, the law prescribes the following qualifications of these officers, as follows: "1st. Said board" (of commissioners) "shall be strictly non-partisan in character, two members thereof to be from each of the two leading political parties in said city. 2d. One of said registrars" (district board of registration) "to be from each of the two leading political parties in said city. 3d. One inspector" (of elections) "so appointed, to be from each of the

two political parties represented in the common council of said city."

The law also provides that if any vacancy shall occur in the district registrars or election inspectors, such vacancy shall be filled from the same political party to which the absentee belongs. Sect. 1, art. 7, of our Constitution, prescribes the qualifications of electors. It contains no provision for a registration law; and such a law can only be sustained and upheld under sect. 1, art. 7, of that instrument, which authorizes the legislature to pass laws "to preserve the purity of elections and guard against abuses of the elective franchise." The legislature is utterly powerless to pass any act to hinder or abridge, in the exercise of the electoral right, any person who is an elector under the constitution, except the manifest intent and operation of the law be to protect the legal voters from fraud and abuse of the elective franchise. If a registration law, therefore, is constitutional, it must be so drawn as by its terms to proscribe no man because of his political belief; and the officers whose duty it is to operate the machinery of registration and election, who sit in judgment upon the right of citizens to vote, cannot by law be restricted to any or two political parties.

We must take judicial knowledge of the current undisputed history of our state and country, and act upon the assumption and the fact that there are to-day, at least, in the state of Michigan and in the city of Detroit, four political parties, to wit: Republican, Democratic, National or Greenback, and Union or Prohibition. To confine the registration and election boards to men composed wholly of any one, two or three of these parties, would be a plain violation of the spirit of our constitution, and have a tendency to hamper and abridge the elective rights of those belonging to the political party or parties who, by law, would not and could not have any representation upon such boards. But such a law is also in direct conflict with the plain letter of the constitution. Sect. 1, art. 18, of that instrument, after prescribing the form of the official oath of the members of the legislature, and all officers, executive and judicial, concludes as follows: "And no other oath, declaration or test, shall be required as a qualification for any office or public trust."

In my opinion there can be no doubt but this law subjects the officers of registration and election in Detroit to a political test. If the two leading parties in that city be Democratic and Republican,

then any citizen who cannot, by reason of his political conscience, ally himself with one or the other of these parties, is debarred by law of the right of holding one of these offices. If the National and Prohibition parties should be the two leading ones, then the Republican or Democrat would be ostracised. There can be in a true republican government no political or religious test in holding office, the political and religious liberty of the citizen being at the foundation of republican institutions. If this law had provided in express terms that these various boards should be equally divided between Democrats and Republicans, its repugnance to the constitution would be plainly apparent to all. As it is, it accomplishes by indirect language the same result.

The opinion of Chief Justice CAMPBELL in *People* v. *Hurlbut*, 24 Mich. 90–92, correctly applies the principle that no person can be prevented from holding office because of his political opinions.

Suppose the legislature should enact a law that the school officers of any city or village in this state should be selected equally from the members of the two leading churches therein, making a religious test, would anyone argue for a moment that such an act was constitutional? And certainly the right of the citizen to his political opinions is and should be as zealously guarded as his right to his religious belief.

It is urged that the political proscription in this law is less than actually takes place without it; that those having the appointing power of registrars and inspectors under the old law do, in Detroit, as a matter of fact, appoint all these officers from one party instead of two, thus precluding still more citizens from these places. In answer it can be said that this is an abuse of power not sanctioned by the law, but permitted, if at all, by its silence, while this act before us puts the seal and stamp of approval upon the very abuse it seeks to cure, and makes it a requisite for these officers to be partisans of a certain name or designation; thus making this evil of partisan appointment a permanent feature of our state polity. For if the legislature has power to require that these offices shall be filled by members of two parties only, it is competent to pass a law that they shall be holden only by the members of the leading party; and a partisan majority in the legislature might fix the political belief of every municipal officer in the state, taking from the people of the locality the right to have a government of a different political color than the legislature. The remedy is worse than the disease.

It is not only political oppression, but a deprivation of a local self-government.

Suppose that in one or more election districts in the city of Detroit, the Nationals and Prohibitionists combined were numerically stronger than the united Republicans and Democrats, though a minority in the whole city. Then, in these days of party coalition, it might be possible for the Democrats and Republicans, controlling the boards of registration and election in the city, and in these wards and districts, to combine against the other two parties in such districts. In such a case there would be naturally the same incentive to and opportunity for frauds and abuses as if all the registrars and inspectors belonged to one party; and it is therefore doubtful if the present law would in all cases have the effect desired.

Suppose, further, the two leading parties in Detroit to be, as they actually are Democratic and Republican. The plurality of these dominant parties over the third party might be so small and trifling in the entire city that in two-thirds or even three-quarters of the wards in the city the third party might have a plurality of votes over either, and yet have no representation except one inspector upon any of these boards, and therefore liable to the same evils that we now deplore.

Again, the inspectors must be of the same political shade as the two leading parties in the common council; and it would not be an unusual thing to have the leading parties in the city not the same as the leading parties in the common council.

The argument might be elaborated further, but it is useless. In any way we turn this law, and apply it to the common every-day occurrences in political life and action at our elections, the more clearly does it appear that this act can have no other effect than a disfranchisement of a large body of the people from holding these offices, simply, because they are politically for the time being in the minority in the whole city. And it should be remembered that all are liable to bear its ostracism. The changes and fluctuations in votes constantly going on, often places the majority at the last election in the minority at the next, and they who wield the club of power under this law to-day may feel themselves its weight to-morrow.

I fully agree in the views so ably expressed by Justice CAMPBELL in the leading opinion filed in this case. The nearer the officers are to the people over whom they have control the more

easily and readily are reached the evils that result from political corruption, and the more speedy and certain the cure. The form of our state government pre-supposes that the people of each locality, each municipal district or political unit, are intelligent and virtuous enough to be fully capable of self-government, and the idea that the further removed the election officers are from the people, the less we encourage fraud and the more nearly we attain virtue at the ballot-box, is not in harmony with the theory and spirit of our institutions. It matters not what legislation has heretofore been adopted in the same road with this law; it is our duty to deal with the encroachment brought before us and to remove it.

The writ of mandamus must be denied.

The principal case is one of general importance. We have been able to find only two other cases directly bearing upon the point involved, viz., the case of *Baltimore* v. *State*, 15 Md. 464, and the case of *The People* v. *Hurlbut*, 24 Mich. 44, referred to in the principal case. The principle involved, however, seems very clear. The general doctrine is thus stated by Judge COOLEY, in his work on Constitutional Limitations: "A statute would not be constitutional which should proscribe a class or party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality are exempt." In illustration of the first clause of the above quotation, the case of *Baltimore* v. *State*, *supra*, is cited. That case is an interesting one. The Constitution of Maryland, then in force, contained the following provision: "That no other test or qualification ought to be required on admission to any office of trust or profit, than such oath of office as may be prescribed by the constitution, or by the laws of the state, and a declaration of belief in the Christian religion; and if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments." Declaration of Rights, art. 34.

By the 6th section of the Metropolitan Police Law of Baltimore (1859), it was provided, that "no Black Republican, or indorser or supporter of the Helper Book shall be appointed to any office" under the Police Board by it established. The objection to this clause as being unconstitutional was thus summarily disposed of by the court: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions." The court then very disingenuously evaded the question by saying: "But we cannot understand officially who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question;" a conclusion which Judge COOLEY very justly criticises as follows:

"This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations, cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents,

the inference that it is done because of political opinion seems too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of those facts of general notoriety, which, like the names of political parties, are a part of the public history of the times."

The case of *The People* v. *Hurlbut*, has a more direct bearing upon the point in question. Among several other important constitutional questions, the question involved in the principal case came up for consideration, and was discussed by the several members of the court; the case, however, was decided upon other grounds.

CHRISTIANCY, J., while seeming to favor the constitutionality of the clause in question, thought the decision of it unnecessary in that case. CAMPBELL, C. J., expressed a clear and forcible opinion against its constitutionality.

COOLEY, J., with reference to this point, among other things, said (page 94): "Nor can the whole act be void because of the provision that the appointees under it shall be members of two certain political parties. That provision, so far as it was designed to control appointments for the future, is simply nugatory, because the legislature on general principles have no power to make party affiliations a qualification for office. But so far as the provision can be regarded as a declaration that the appointees named have been selected because they sustained the specified party relations, we need only say that when a right of choice exists, an election cannot be held void because of the reasons assigned for the choice made. * * * All that the law can do is to allow freedom of selection by proscribing nobody, and to confer the power of choice upon the persons or body most likely to be governed by correct motives; and the choice thus made must be conclusively presumed to have been made upon the proper grounds."

From what has been above quoted, it will be seen that upon the question as to the right of the legislature to prescribe the political tests in question, the majority of the court who rendered opinions in the case were in harmony, the divergence of opinion taking place upon the question as to the effect of this clause upon the rest of the act.

As to the main question in the principal case, viz., whether the proposed test is unconstitutional or not, we do not see how there can well be any difference of opinion. The decision upon this question seems clearly correct; and to us it seems equally clear that this party representation is the essential purpose of the act, and that the whole act must stand or fall with the clause. This, however, involves another question which we do not propose discussing at this time. The principles governing the question are clear and well settled, and we shall content ourselves by a simple reference to Judge COOLEY'S great work on Constitutional Limitations, where the subject will be found fully discussed.

MARSHALL D. EWELL.

Chicago.

Supreme Court of United States.

NORRINGTON *v.* WRIGHT ET AL.[1]

Under a contract to deliver 5000 tons of iron rails at a specified price per ton, to be shipped at the rate of about 1000 tons per month, settlement cash on presentation of bills, the seller's failure to ship the required quantity in the first month gives the buyer the right to rescind the whole contract.

Such a contract is an entire contract, and the subsidiary provisions as to shipping in different months, and as to paying for each shipment on delivery, do not so split up the contract that a seller in default as to one delivery can insist upon the acceptance of the subsequent deliveries.

The English cases reviewed and the weight of authority held to be in favor of the rule laid down in *Hoare* v. *Rennie*, 5 H. & N. 19.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of assumpsit brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19th 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London, five thousand (5000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1000) tons per month, beginning February 1880, but whole contract to be shipped before August 1st 1880, at forty-five dollars ($45.00) per ton of 2240 lbs. custom house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments, with vessel's names, as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

EDWARD J. ETTING,
Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5000 tons of T iron rails, to be shipped at the rate of about 1000 tons a month, begin-

[1] See the note to the opinion of the court below in this case, 21 Am. L. Reg. (N. S.) 298; and see also the recent case of *Blackburn* v. *Reilly*, Court of Errors and Appeals of New Jersey, *infra* 59.

ning in February, and ending in July 1880. The second count set forth the contract *verbatim.* Each of these two counts alleged that the plaintiffs, in February, March, April, May, June and July, shipped the goods at the rate of about 1000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendant's refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiff at the rate of about 1000 tons a month in March, April, May, June and July. The defendants pleaded *non assumpsit.* The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the latter part of February, 885 tons by two vessels in March, 1571 tons by five vessels in April, 850 tons by three vessels in May, 1000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any

remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th, Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for 5000 tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about 1000 tons per month." "As to April, while it seems to me too plain to require any remark, I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or for that matter, to make the delivery of precisely 1000 tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract, but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th, the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about 1000 tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be, and certainly neither the February, March, or April shipments are within the limits." "As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterward vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can

it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10th, Etting offered to the defendants the alternative of delivering to them 1000 tons, strict measure, on account of the shipments in April. This offer they immediately declined.

On June 15th, Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendant, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended—1. That under the contract he had six months in which to ship 5000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1000 tons in any one month. 2. That, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Samuel Dickson and *John C. Bullitt*, for plaintiff in error.

R. C. McMurtrie, for defendants in error.

The opinion of the court was delivered by

GRAY, J. (after stating the facts as above).—In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded, as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract: *Behn* v. *Burness*, 3 B. & S. 751; *Bowes* v. *Shand*, 2 App. Cas. 455; *Lowber* v. *Bangs*, 2 Wall. 728; *Davison* v. *Von Tingen*, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron: *Mersey Co.* v. *Naylor*, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1000 tons per month, beginning February 1880, but whole contract to be shipped before August 1st, 1880. These words are not satisfied by shipping one-sixth part of the 5000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in July. The contract is not one for the sale of a lot of goods, identified by inde-

pendent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill — in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. The contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight:" *Brooklyn* v. *United States*, 96 U. S. 168, 171, 172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month, gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1000 tons in February and about 1000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments, justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the

market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon* v. *Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add, that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare* v. *Rennie*, 5 H. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs, that they would not accept the rest. The defendants pleaded that the shipment in June was of about twenty tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, Chief Baron POLLOCK saying: "The defendants refused to accept the first shipment, because, as

they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action:" 5 H. & N. 28. So in *Coddington* v. *Paleologo*, L. R., 2 Ex. 193, while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand in *Simpson* v. *Crippin*, L. R., 8 Q. B. 14, under a contract to supply from 6000 to 8000 tons of coal, to be taken by the buyers' wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month, and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt* v. *Lawrence*, 1 Q. B. Div. 344, in which the contract was for the purchase of 4500 quarters, ten per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1139 quarters were shipped by one steamer in time, and 3361 quarters were shipped too late, it was held that the buyer was bound to accept the 1139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes* v. *Shand*, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords: 1 Q. B. D. 470; 2 Id. 112; 2 App. Cas. 455.

In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast,

for this port, during the months of March and (or) April, 1874, per Rajah of Cochin." The 600 tons filled 8200 bags, of which 7120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as the rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor CAIRNS said: "It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance:" 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get aid of, or displace that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled:" pp. 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but

that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said that it bears, that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice, to be put on board at Madras during the particular months.." "The plaintiff, who sues upon that contract has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfilment of the contract:" 467, 468.

Lord BLACKBURN said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfilment of that contract, it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it:' 2 App. Cas. 480, 481.

Soon after that decision of the House of Lords two cases were determined in the Court of Appeal. In *Reuter* v. *Salá*, 4 C.P.D. 239, under a contract for the sale of "about twenty-five tons (more or less) black pepper, October and (or) November shipment, from Penang to London, the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading," the seller, within the sixty days

declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Houck* v. *Muller*, 7 Q. B. D. 92, under a contract for the sale of 2000 tons of pig iron, to be delivered to the buyer free on board, at the maker's wharf "in November, or equally over November, December and January next," the buyer failed to take any in November, but demanded delivery of one-third in December, and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as cancelled by the buyer not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co.* v. *Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeal in 9 Q. B. D. 648, and following the decision of the Court of Common Pleas in *Freeth* v. *Burr*, L. R., 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery, does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make any further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor SELBORNE, in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment.

The Lord Chancellor said: "The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract as to the time of delivery. 'Delivery 1000 tons monthly commencing January next;' and as to the time of payment, 'Payment net cash within three days after receipt of shipping documents;' but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the

delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilmen- of the unfulfilled part of the contract, by the delivery of the unde livered steel:" 9 App. Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in *Simpson* v. *Crippin*, and to disparage the decisions in *Hoare* v. *Rennie* and *Houck* v. *Muller*, above cited, yet in the House of Lords *Simpson* v. *Crippin* was not even referred to, and Lord BLACKBURN, who had given the leading opinion in that case, as well as Lord BRAMWELL, who had delivered the leading opinion in *Houck* v. *Muller*, distinguished *Hoare* v. *Rennie* and *Houck* v. *Muller* from the case in judgment: 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare* v. *Rennie*, and *Coddington* v. *Paleologo*, as well as in the later cases of *Reuter* v. *Sala*, and *Houck* v. *Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson* v. *Crippin* and *Brandt* v. *Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes* v. *Shand*, while it in nowise contravenes the decision of that tribunal in *Mersey Co.* v. *Naylor*.

In this country, there is less judicial authority upon the question. The two cases most nearly in point, that have come to our notice, are *Hill* v. *Blake*, 97 N. Y. 216, which accords with *Bowes* v. *Shand*, and *King Philip Mills* v. *Slater*, 12 R. I. 82, which approves and follows *Hoare* v. *Rennie*. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn* v. *Bodine*, 60 Penn. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan* v. *McKee*, 77 Penn. St. 228, and in *Scott* v. *Kittanning Coal Co.*, 89 Id. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment, was denied, only because that right had been waived, in the one case by unreason-

able delay in asserting it, and in the other by having accepted, paid for and used a previous instalment of the goods. The decision of the Supreme Judicial Court of Massachusetts, in *Winchester* v. *Newton*, 2 Allen 492, resembles that of the House of Lords in *Mersey Co.* v. *Naylor*.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk* v. *Spence*, 4 Camp. 329; *Graves* v. *Legg*, 9 Exch. 709; *Reuter* v. *Sala*, above cited.

Judgment affirmed.

The Chief Justice was not present at the argument and took no part in the decision of this case.

Court of Errors and Appeals of New Jersey.

BLACKBURN *v.* REILLY.[1]

Upon a contract of sale to be performed not by single acts of delivery and payment, but by a series of deliveries and payments at stated intervals, defaults by one party in making particular deliveries or payments will not release the other party unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms.

Plaintiff agreed to deliver to defendant 52 car-loads of bark, at $18 a ton, to be delivered at the rate of one car-load per week. Plaintiff delivered five car-loads. Defendant paid for these, but subsequently discovered the bark to be defective in quality, and refused to receive any more. *Held*, that the defective quality of the bark delivered did not release defendant from his obligation to accept and pay for the remaining car-loads.

Mersey Steel and Iron Co. v. *Naylor*, 9 App. Cas. 434, followed.

In case. In error to the Essex Circuit Court.

Blackburn, the plaintiff below, a Virginia dealer in bark, entered into a contract on May 13th 1882, to sell to the defendant below, Reilly, a Newark tanner, for use in his business, 52 car-loads of

[1] See *Norrington* v. *Wright*, *supra*, page 47.

bark, at the price of $18 a ton, to be delivered at the rate of one car load per week until the whole should have been delivered. Under this contract five car-loads were actually delivered. This was stored by Reilly in a loft over his tannery with other bark. It was all paid for at the contract price by July 3d, 1882, but none of it was used until July 15th. Reilly claims that it was then found to be musty, lumpy, and unfit for the purpose for which it had been bought; and shortly after Reilly notified Blackburn not to send any more—first by mail, alleging that he was overcrowded, and shortly afterwards in a personal interview, alleging its unmerchantable condition.

In January, 1883, and before the expiration of the year within which the bark was to have been delivered, Blackburn brought suit, setting forth the above contract and the breach of it. The defendant pleaded the general issue. Before trial, however, the parties came to an understanding, and made an agreement in writing, dated March 27th, 1883, which was delivered on April 4th, 1883. By its terms it was stipulated that the contract for the breach of which suit had been brought should be completed by the delivery by Blackburn of a sufficient number of car loads of bark to make, with what had already been delivered, 52 car loads, at the price of $17 per ton, payable on delivery of each car load. This new agreement then went on to provide as follows: "(4) One car load only shall be delivered during each week after shipments shall begin, and said shipments shall begin on the first day of April next, or within ten days thereafter." "(6) This suit shall not be discontinued or *non prossed* until the final completion of this contract. The plaintiff shall then discontinue it without costs. But in case of a breach of this contract by said Reilly, the plaintiff may proceed in this suit by requiring the defendant to plead, and the suit shall proceed thereon to trial, and the damages to be recovered shall be measured by the original contract sued on. Said Reilly shall, on the execution hereof, pay the taxed costs of the plaintiff. It is understood that this suit is not settled unless the terms of this contract are faithfully carried out by said Reilly."

Blackburn did not deliver any bark within the 10 days stipulated, or subsequently. Reilly, on his part, tendered the costs on April 21st, and gave notice that he would not receive any bark under the contract because of the lapse of time. The tender was refused, and Blackburn insisted on proceeding in the original suit. Reilly

then pleaded *puis darrein continuance*, two additional pleas setting forth the new agreement, Blackburn's failure to deliver under it, and Reilly's tender of costs, to which Blackburn demurred, and judgment was given in favor of the demurrant. The case then went to trial on the general issue as originally pleaded; the damages claimed being damages for the breach of the first agreement. The defence interposed was that the delivery of five loads of unmerchantable bark justified the defendant in refusing to receive any more bark under the contract. This defence was overruled by the court, and the plaintiff had judgment. Exceptions being sealed for the defendant, he brought this writ of error.

Mr. Coult, for plaintiff.

Mr. Stevens, for defendant.

The opinion of the court was delivered by

DIXON, J.—The first question for decision on this writ of error is whether the pleas *puis darrein continuance* were good. They were pleaded in bar of the action, and a prime requisite of such pleas is that they shall allege facts which form a conclusive answer to the action, and entitle the defendant to a final judgment in the cause. 1 Chit. Pl. 525. The express terms of the contract relied on in these pleas show that nothing growing out of and dependent upon that agreement could have this broad effect in favor of the defendant. According to its provisions, the defendant was forthwith to pay the costs of this suit. In case he failed to comply with its stipulations, the suit was to proceed as if the contract had not been made; and if he fully performed it, the plaintiff was to discontinue the suit without costs. So that the effect upon the pending litigation which could result from circumstances the most favorable to the defendant was that the plaintiff could be compelled to discontinue it without costs. That is quite different from the judgment for defendant to be rendered upon a good plea in bar which would award costs to the defendant, and be conclusive in his favor upon all subsequent litigation involving the same issues. It is evident that the effect which the parties intended to produce on the pending suit by force of this agreement could be properly secured only by motion, not by plea. The demurrer to these pleas was good.

The other question discussed on the argument was whether the defendant had the right to refuse to receive any more bark in case

he could satisfy the jury that the five loads of bark delivered were not equal in quality to the requirements of the contract. The contract provided that the plaintiff should deliver, and the defendant should receive, one car-load of bark weekly for a year at $18 a ton, payable on delivery. It belongs to a class of agreements sometimes called continuing contracts of sale, because they are to be completely performed, not by single acts of delivery and payment, but by a series of such acts at stated intervals. The rule to be applied in determining whether the express obligations of such contracts remain after one or more breaches by either party has been the subject of much discussion of late years, and has given rise to some contrariety of judicial opinion. We do not feel constrained by the phases of the present case to enter at any length upon the details of this discussion. In our opinion the rule established in England by the judgment of the House of Lords in *Mersey Steel & Iron Co.* v. *Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeals in s. c. 9 Q. B. Div. 648, is one which in ordinary contracts of this nature will work out results most conformable to reason and justice. The rule is that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might enure to him from an option to rescind the bargain. It also accords with the ancient doctrine laid down by Serjeant Williams in his notes to *Pordage* v. *Cole*, 1 Saund. 320*b*, that where a covenant (of the plaintiff) goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract on the part of the defendant without averring performance in the declaration. It of course is inapplicable where the parties have expressed their intention to make performance of a stipulation touching a part of the bargain a condition precedent to the continuing obligation of the contract; and peculiar cases might arise where the courts would infer such an intention from the nature and circumstances of the bargain itself, cases in which the courts would see that the partial

stipulation was so important, so went to the root of the matter (to use a phrase of BLACKBURN, J., in *Poussard* v. *Spiers*, 1 Q. B. Div. 410), as to make its performance a condition of the obligation to proceed in the contract.

The case in hand is one of ordinary character, and therefore the question under the rule is whether the circumstances would warrant an inference by the jury that the plaintiff purposed to abandon the contract, or no longer to be bound by its terms. This question is, we think, not doubtful. The plaintiff had delivered five car-loads, which had been accepted and paid for by the defendant without any intimation that they were not satisfactory; was ready to deliver the sixth when the defendant requested delay; and was prevented from further deliveries only by the peremptory refusal of the defendant to receive any more. Against this refusal the plaintiff protested, then proposed an arbitration, and threatened suit if the defendant should persist, and finally brought this action for damages. In the face of all this there is not a shadow of reason for saying that the plaintiff had abandoned or repudiated the contract. If the five deliveries of defective bark had been made against notice and remonstrance, it might have suggested the idea that the plaintiff meant to disregard his obligations; but by the defendant's acceptance of and payment for the bark without objection this ground for a possible inference of repudiation is wanting in the case. We regard it as incontestable that the deliveries were made in recognition of the binding force of the agreement. The defendant, therefore was not discharged. *Cahen* v. *Platt*, 69 N. Y. 348, was precisely like the case before us. The plaintiff had agreed to sell the defendant glass, to be delivered in instalments. He had made several deliveries, which had been accepted and paid for by the defendant. Subsequently the defendant complained of the quality, and refused to receive any more. The suit was for damages resulting from the refusal, and the plaintiff recovered. *Scott* v. *Kittanning Coal Co.*, 89 Penn. St. 231, was also similar; but there the defendant contended that the conduct of the plaintiff in the delivery of the defective coal was fraudulent, yet the court held the defendant would not be thereby discharged.

There was no error in the ruling of the trial justice on this proffered defence. The judgment below should be affirmed.

Supreme Judicial Court of Massachusetts.

NORCROSS *v.* JAMES.

Covenants running with the land may be divided into two classes, viz., those annexed to the estate, such as the ancient warranty now represented by the usual covenants for title, and those which are attached to the land itself, such as rights of common or easements.

Covenants of the latter class, in order to be enforceable against the assignees of the covenantor, must "touch and concern," or "extend to the support of" the land conveyed.

A covenant in a deed for land containing a quarry that the grantor will not open or work or allow to be opened or worked, any quarry on a certain farm then owned by the grantor adjoining the land conveyed, is not such a covenant as may be enforced against the assigns of the grantor.

THIS was a bill in equity to restrain the defendants from the breach of a covenant in a deed from one Luke Kibbe, Jr., to William N. Flynt. The case was reported to the full bench of the Supreme Court on an agreed statement of facts, in which it appeared that one of the inducements of the purchase of the estate was the valuable quarry of marble it contained, and the covenant the deed contained restraining the quarrying of marble on the adjoining land. The plaintiff contended that the covenant was one that ran with the land, and, as such, was binding on the heirs and assigns of the covenantor, in favor of the heirs and assigns of the covenantee. The defendant contended that it was personal, and that it was also void, as being in restraint of trade. The material facts appear in the opinion.

James G. Dunning, for the plaintiff.

Charles L. Long, for the defendant.

The opinion of the court was delivered by

HOLMES, J.—One Kibbe conveyed to one Flynt a valuable quarry of six acres, bounded by other land of the grantor, with covenants as follows: "And I do for myself, my heirs, executors and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seised in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Long Meadow." By mesne conveyance the plaintiffs have become pos-

sessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land like that quarried by the plaintiffs and the plaintiffs bring their bill for an injunction.

The discussion of the question under what circumstances a landowner is entitled to rights created by way of covenant with a former owner of the land has been much confused since the time of Lord COKE, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land, and those which are said to be attached to the land itself.

"So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land:" *Chudleigh's Case*, 1 Rep. 122 b.; s. c. Popham 70, 71.

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question, How an assignee could sue upon a contract to which he was not a party (West, Symboleog. I. sect. 35; Wingate's Maxims 44, pl. 20, 55, pl. 10; Co. Litt., 117a; *Sir Moyle Finch's Case*, 4 Inst. 85). But an heir could sue upon a warranty of his ancestor, because for that purpose he was *eadem persona cum antecessore.* (See Y. B., 20 & 21 Ed. I., 232 (Rolls ed.); *Oates* v. *Frith*, Hob. 180; *Bain* v. *Cooper*, 1 Dowl. Pr. Cas. N. S. 11, 14). And the conception was gradually extended in a qualified way to assigns where they were mentioned in the deed; Bract. fol. 17 b; 67 a, 380 d; 381; Fleta. III. chap. 14, sect. 6; 1 Britton (Nich.) 255, 256; Y. B., 20 Ed. I. 232–234 Roll's ed.); Fitz. Abr. *Covenant*, pl. 28; Vin. Abr. *Voucher* N, p. 59; Y. B. 14 H. 4, 56; 20 H. 6, 34 b; Old Natura Brevium, *Covenant*, 67, B. C. in Rastell's Law Tracts, ed. 1534; Dr. and Student, I., chap. 8; F. N. B. 145 c; Co. Litt., 384 b; Com. Dig. *Covenant*, B 3; *Middlemore* v. *Goodale*, Cro. Car. 503; s. c. Id. 505; W. Jones 406; *Philpot* v. *Hoare*, 2 Atk. 219. But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona quoad* the contract. But as will be seen, the privity of estate which is thus required, is privity of the estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the

ancient books. See further, Y. B., 21 & 22 Ed. I. 148 (Roll's ed.); 14 Hen. IV., pl. 5. Of course we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. F. N. B. 134 E. We may add that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir as representing the person of his ancestor. Y. B., 32 & 33 Edw. I. 516 (Roll's ed).

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. "So a disseisor, abator, intruder, or the lord by escheat, &c., shall have them as things annexed to the land. *Chudleigh's Case, ubi supra.* (See 1 Britton [Nichols' ed.] 361; Keilway, 145, 146, pl. 15; F. N. B. 180 N.; *Sir H. Nevil's Case*, Plowden 377, 381.) In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant, or grant, went with the servient land into all hands, and of course there was no need to mention assigns. See cases *supra et infra.* The phrase consecrated to cases where privity was not necessary was *transit terra cum onere.* (Bract., fol. 382, *a. b.* Fleta, VI., chap. 23, sect. 17. See Y. B., 20 Ed. I. 360 [Roll's ed.]; Keilway 113 pl. 45.) And it was said that "a covenant which runs and rests with the land lies for or against the assignee at common law, *quia transit terra cum onere*, although the assignee be not named in the covenant." (*Hyde* v. *Dean of Windsor*, Cro. Eliz. 552; Ibid. 457, s. c. 5 Co. Rep. 24 a; Moore 309.)

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant: It is enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is *Pakenham's Case*, Y. B., 42 Ed. III., pl. 14, when the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor: *Spencer's*

Case, 5 Co. Rep. 16*a*, 17*b*. Another which has been recognised in this Commonwealth is the *quasi* easement to have fences maintained: *Bronson* v. *Coffin*, 108 Mass. 175, 185; s. c. 118 Id. 156. Repairs were dealt with on the same footing: they were likened to estovers and other rights of common: 5 Co. Rep. 24 *a*. *b*; *Hyde* v. *Dean of Windsor*, *ubi supra*. See F. N. B. 127; *Spencer's Case*, *ubi supra*; *Ewre* v. *Strickland*, Cro. Car. 240; *Brett* v. *Cumberland*, 1 Roll. R. 359, 360; and other examples might be given. See Bract. 382, *a*. *b*.; Fleta, vi., c. 53, § 17; Y. B., 20 Ed. I., 360; Keilway 2 *a*, pl. 2; Y. B., 6 Hen. VII., 14 *b*, pl. 2; Co. Litt. 384 *b*, 385 *a*.; *Cockson* v. *Cock*, Cro. Jac. 125; *Bush* v. *Cole*, 12 Mod. 24; s. c. 1 Salk. 196; 1 Shower 388; Carthew 232; *Sale* v. *Kitchenham*, 10 Mod. 158. The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said, in this class of cases, that there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi*-easement, or must be in aid of such a grant (*Bronson* v. *Coffin*, *ubi supra*), which is generally true, although, as has been shown, not invariably (*Pakenham's Case*, *ubi supra*), and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression, privity of estate, in this sense is of modern use, and has been carried over from the cases of warranty where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord COKE is sufficiently clear; and it is enough to say that the present covenant falls into the second class, if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and we will take it as intended to do so for the benefit of the land conveyed.

The restriction is in form within the equitable doctrine of notice: *Whitney* v. *Union Railway Co.*, 11 Gray 359; *Parker* v. *Nightingale*, 6 Allen 341. See *Tulk* v. *Moxhay*, 2 Phillips 774; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *London & S. W. Railway Co.* v. *Gomm*, 20 Ch. Div. 562; *Austerberry* v. *Oldham*, 29 Id. 750. But as the deed is recorded, it does

not matter whether the plaintiff's case is discussed on this footing or on that of easement.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognise as creating an easement, every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants, applies also to negative ones. They must "touch and concern," or "extend to the support of the thing" conveyed: 5 Co. Rep. 16 *a*, Ibid. 24 *b*. They must be "for the benefit of the estate:" *Cockson* v. *Cock*, Cro. Jac. 125. Or as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden: *Keppell* v. *Bailey*, 2 My. & K. 517, 535; *Ackroyd* v. *Smith*, 10 C. B. 164; *Hill* v. *Tupper*, 2 H. & C. 121.

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked, what is the difference in principle between an easement to have land unbuilt upon, such as was recognised in *Brooks* v. *Reynolds*, 108 Mass. 31; and an easement to have a quarry left unopened, the answer is, that whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly —an easement not to be competed with—and in that interest alone a right to prohibit one owner from exercising the usual incidents